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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 398

HORSMAN DOLLS, INC.,
Plaintiff-Appellant,

vs.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Defendant-Appellee

STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Appellant contends that the basis upon which the Supreme Court of the United States has jurisdiction to review on appeal the judgment of the Supreme Court of New Jersey in this cause is:

1. The statutory provisions sustaining the jurisdiction are found in Title 28, U. S. Code, Section 1257(2):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> • • • • • • •

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

2. The statute of the State of New Jersey, the validity of which is involved, is New Jersey Revised Statutes Title 43: 21-6(b) as said statute existed in 1942. The aforesaid section of the statute involved appears on page 244 of Title 43, New Jersey Statutes Annotated. The section provides:

"(b) Initial determination. A representative designated by the executive director, and hereinafter referred to as a 'deputy', shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof or shall refer such claim or any question involved therein to an appeal tribunal or to the board of review, which shall make its determinations with respect thereto in accordance with the procedure described in subsection (c) of this section, except that in any case in which the payment or denial or benefits will be determined by the provisions of subsection (d) of section 43:21-5 of this title, the deputy shall promptly transmit his full findings of fact with respect to that subsection to the board of review, which, on the basis of the evidence submitted and such additional evidence as it may require, shall affirm, modify, or set aside such findings of fact and transmit to the deputy a decision upon the issues involved under that subsection. The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. Unless the claimant or any such interested party, within five calendar days after the delivery of such notification, or within seven calendar days after such notification was mailed to his last-

known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith. If an appeal is duly filed, benefits with respect to the period prior to the final determination of the board of review, shall be paid only after such determination; provided, that if an appeal tribunal affirms a decision of a deputy, or the board of review affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid."

3. The decision of the Supreme Court of New Jersey was rendered on June 25, 1951 and the judgment on said decision which is here sought to be reviewed was entered on the same day. The date upon which application for this appeal was presented was September 19, 1951.

(Reference hereinafter made to the record refers to the record as filed with the Supreme Court of New Jersey.)

4. The appellant is a subject employer under the New Jersey Unemployment Compensation Law, N. J. R. S. 43: 21-1 *et seq.* This statute was adopted in 1936. Under its provisions there was established an unemployment compensation fund to which employees and employers contributed. The statute provided that until 1942 the contribution rate of all employers was to be uniform but that rates fixed for the year 1942 and thereafter would be controlled by the past employment experience of each employer. An account was to be created in the Commission for each subject employer. This account was to be credited with contributions by the employers at the statutory rate and charged with benefits paid by the Commission to former employees who were entitled to benefit payments under the statutory provisions. The debits and credits to this account

were vital factors in determining the contribution rate to be assigned to the employer.

5. In July, 1942, the appellant was notified by the Commission that on the basis of its previous experience the Commission had fixed a rate of 2.7% of the annual payroll of the appellant as the contribution rate for 1942 (R. 269a). In January of 1943 the Commission notified the appellant that the 2.7% rate had been erroneously assigned and that instead, the rate applicable to the plaintiff for the year 1942 was 3.6% (R. 7a). This was the highest rate which the statute authorized. It was a penalty rate occasioned by the fact that the records of the Commission showed that the benefits paid to appellant's former employees substantially exceeded the sum contributed to the fund by the appellant.

6. The notice fixing the contribution rate advised the appellant that if it disagreed with the rate it should request a hearing, and the Commission sent to the appellant its form for use in order to obtain such a hearing (R. 10a). This form was completed as required and the Commission assigned the case to one of its referees for trial. Numerous hearings were held before the referee but before his decision was rendered the Commission withdrew the case to itself for decision. The validity of this removal was tested in the courts and finally sustained. Thereafter the Commission rendered a decision rejecting the plaintiff's petition for a redetermination of its rate. The case was then brought for review before the former Supreme Court of New Jersey on certiorari, the then prevailing procedure.

7. Before the Commission (R. 183a), and thereafter in the courts (R. 23a), the appellant pointed out that no provision was made in the statute for a hearing before the deputy of the Commission who was designated by the statute to find the facts and decide upon the validity of the claim for benefits. The appellant contended that in this respect

the statute was unconstitutional since the deputy made a decision in a quasi-judicial proceeding without giving the employer an opportunity to be heard. Appellant pointed out, however, that the statute did prescribe a method of affording the hearing required by due process by the provision that notice of the decision of the deputy was to be given to the employer. He could then take an appeal which would stay the payment of the benefits and thus procure a hearing on the validity of the claim. In that hearing on the appeal, the employee had the burden of proof in an adversary proceeding to establish his right to benefits.

8. The appellant contended that unless the statute were construed so as to require the deputy to notify it of the decision, the statute was unconstitutional because the payment of benefits without such notice to the employer deprived it of its right of appeal and denied it any opportunity to be heard before the benefits were paid and the charges assessed against its account. It was established during the hearing before the referee that no notice of any decision rendered by the deputy was ever sent to the appellant by the Commission. The Commission paid benefits to the former employees of the appellant without notifying the appellant that a decision had been made and that its account was being charged with the payments. Its property was thus taken without due process of law.

9. The Commission contended that the appellant was not entitled to notice of the decision under the statute because it was not "an interested party" within the statutory language describing those to whom notice of the decision should be sent. The Commission also contended that when claims for benefits were filed with it by former employees of the plaintiff, notice of the filing of the claims had been sent to the plaintiff where the plaintiff was the last employer of the claimant and the plaintiff failed to furnish

the Commission with any information indicating that the claimant was disqualified from benefits. The Commission contended that the failure of the plaintiff to respond to the notice of the filing of the claim for benefits estopped the plaintiff from raising the question that it was prejudiced by the failure of the deputy to send the plaintiff the notice of decision, the only notice which the statute provided.

10. In answer to this contention, the appellant submitted that the Commission had no right to substitute the notice that a claim had been filed in place of the statutory notice of decision, in view of the fact that the only right of appeal provided by statute was from the decision of the deputy. The appellant also pointed out that the notice of the filing of the claim which it received solicited information only as to disqualifying causes within the knowledge of the employer, and instructed the employer that no answer was necessary unless he knew of disqualifying causes (R. 276a). In view of the fact that under the statute there were many disqualifying causes not possibly within the knowledge of the employer, but ascertainable only upon the examination of the facts by the deputy, the failure of the employer to respond to the notice could not estop it from receiving its constitutional right to a timely hearing before the payments were made, as provided in the statute. This point was made in the dissenting opinion of the Supreme Court. In addition, the appellant pointed out that the Commission conceded that not even a notice of the filing of the claim was sent to the appellant by the Commission where the appellant was not the most recent employer of the claimant but was charged as an employer in the base year. As to these charges against its account the appellant had no notice whatsoever, even of the filing of the claim. Yet its account was charged for benefits paid.

11. The appeal was heard by the Appellate Division of the Superior Court of New Jersey which succeeded to the

jurisdiction of the former New Jersey Supreme Court after the change in the New Jersey court structure. The Appellate Division unanimously reversed the decision of the Unemployment Compensation Commission. It held that the statutory provision that notice of the decision on benefit payments was to be sent to the plaintiff could not be dispensed with by the Commission. The opinion of the Appellate Division is appended to this statement.

12. The case was then taken to the Supreme Court of New Jersey which granted certification upon application of the Commission. At the oral argument and re-argument of the appeal it was contended by the Commission and suggested by several members of the court that there was no requirement in the statute for any notice or opportunity for the plaintiff to be heard upon the validity of the benefit claim before the benefit payments were made or before the charges were assessed against the plaintiff's account. It was suggested by the court that a grammatical reading of the statute required the construction that notice of a decision need be given only in the case of a labor dispute. The plaintiff responded both orally and in its brief that if the court construed the statute so as to permit the Commission to dispense with the giving of notice of the decision to the appellant in any case where the appellant's account was charged, then the statute was unconstitutional as constituting a deprivation of the plaintiff's property without due process of law in violation of the Constitution of the United States. Under such a construction the plaintiff would never have an opportunity to be heard upon the merits of the claim because (1) no provision for a hearing prior to the deputy's decision was contained in the statute, and (2) the absence of a requirement that appellant receive notice of the decision deprived the appellant of its appeal and thus deprived it of the only opportunity to be heard which the statute provided.

13. In the Supreme Court of New Jersey, the Chief Justice and one associate justice disqualified themselves from sitting on the appeal. The remaining five justices by a vote of three to two reversed the decision of the Appellate Division. The affirmance of the action of the Unemployment Compensation Commission was, therefore, by a vote of a minority of the entire court. The majority opinion construed the statute as including the plaintiff in the category of persons entitled to notice of the decision. It said:

> "As respects 'the decision' to which the provision for notice has reference, and the significance of the phrase 'other interested party', subsection 6(b) is not free from ambiguity. But we shall resolve the doubt in favor of notice."

Notwithstanding this statement, however, the Supreme Court did not construe the provision for notice of the decision to be mandatory, for the court then held that the failure of the Commission to give this statutory notice did not constitute a denial of due process because, in the court's speculative view, even if the plaintiff had received the statutory notice of decision there would have been no appeal therefrom.

14. The dissenting opinion in the Supreme Court stressed the duty put by statute upon the deputy to find the facts and so determine the validity of the claim. It was emphasized that the claim for benefits could be invalid by many incidents which occurred after the worker had left the employer; as to these facts the employer could have no information. The dissenting justices concluded that the failure of the deputy to send the appellant notice of the decision on the claim deprived the appellant of its right of appeal. Both opinions of the Supreme Court of New Jersey are appended to this statement.

15. The Supreme Court of New Jersey has decided, however, that the notice of the filing of the claim for benefits sent to the employer, even though this notice was not provided for in the statute, was appropriate to satisfy the due process requirement of an opportunity to be heard, notwithstanding the fact that the statute required the deputy to send notice of his decision and conditioned the right of appeal upon this notice of decision. The effect of the decision is to sustain the constitutionality of the statute above quoted and the action of the Unemployment Compensation Commission thereunder.

16. The decisions which sustain the jurisdiction of the Supreme Court of the United States to review this case on appeal are: *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126 (1941); *Morgan* v. *U. S.,* 298 U. S. 468 (1936); *Morgan* v. *U. S.,* 304 U. S. 1 (1938); *Shields* v. *Utah Idaho Central Co.,* 305 U. S. 177 (1938); *Mullane* v. *Central Hanover B. & T. Co.,* 339 U. S. 306, (1950); *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935); *Ohio Bell Teleph. Co.* v. *Public Utilities Com.,* 301 U. S. 292 (1937); *Moser* v. *United States,* 95 L. Ed. 457, (1951); *Wuchter* v. *Pizzutti,* 276 U. S. 13 (1927); *Lawrence* v. *State Tax Commission,* 286 U. S. 276 (1932); *Abie State Bank* v. *Bryan,* 282 U. S. 765 (1931); *Ancient Egyptian Arabic Order N. M. S.* v. *Michaux,* 279 U. S. 737 (1929); *Ward* v. *Love County,* 253 U. S. 17 (1920).

17. The section of the statute in question requires the deputy of the Commission to investigate the claim, to make a finding of facts and to render his decision upon its validity. The effect of this decision of the deputy, if the claim for benefits is sustained, is to charge the amount of benefits paid against the employer or employers concerned. Generally the charge will be imposed against the last or most recent employer of the claimant. Where the duration of the employment of the claimant with his last employer is

short, however, a portion of the charge will be assessed against other former employers of the claimant. For this purpose the statute prescribes a "base year" consisting of the first 4 of the last 5 completed calendar quarters prior to the one-year period of eligibility for benefits.

18. The statute also prescribes a series of benefit eligibility conditions (N.J.R.S. 43: 21-4) and a series of causes which will disqualify claimants from benefits (N.J.R.S. 43:21-5). The eligibility conditions consist of the requirements that the individual register for work at, and report to, an employment office; that he makes the required claim for benefits; that he is able to work and is available for work; that he has been unemployed for two weeks, and that he has earned a certain amount of wages during the past year. The causes for disqualification are voluntary cessation from employment without good cause, discharge for misconduct, failure to apply for or accept available or suitable work, work stoppage due to a labor dispute and the receipt of remuneration either in lieu of notice or as compensation under any workmen's compensation law, or as social security benefits or unemployment compensation benefits from another state or the United States.

19. There is no provision in the statute for a hearing by or before the deputy prior to his determination or decision that the claim is valid. Thus his examination of the claim and his finding of facts is made without any requirement by statute that notice be given to the employer concerned and without any opportunity to the employer to be heard before the decision upon the validity of the claim is made.

20. The action of the deputy in finding facts and rendering a decision is quasi-judicial under New Jersey law, *Penna. R. R. Co.* v. *N. J. State Aviation Com.*, 2 N. J. 64 (1949), and under the decisions of this court, *Morgan* v. *U. S.*, 298 U. S. 468 (1936). The failure of the statute to

provide for a hearing before the quasi-judicial determination is made thus constitutes a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

21. Had the Supreme Court of New Jersey construed the statute to make it mandatory upon the deputy to notify all employers of the decision and thus initiate the hearing on appeal, no deprivation of due process would have occurred because the employer would have received an opportunity to be heard at some level in the proceeding before the payment of the benefits, and before the charge against its account. This is the timely opportunity to be heard which due process requires. *Opp Cotton Mills, Inc.* v. *Administrator, supra.*

22. The appellant had a right to rely upon receiving the notice of the decision which the statute directed the deputy to send. Under the construction of the statute by the Supreme Court of New Jersey, the appellant was an "interested party" and thus entitled to notice of the decision. The statute gave to the employer 7 days within which to appeal the decision of the deputy or to acquiesce in the payment. The opportunity to be heard on the appeal which the statute thus afforded was of little worth unless the appellant knew that a decision had been rendered, since the right of appeal and the time for the employer to make its election as to what choice to pursue did not arise until notice of the decision was received. *Mullane* v. *Central Hanover B. & T. Co., supra.*

23. The Supreme Court of New Jersey held that the notice of the filing of the claim for benefits gave appellant an opportunity to be heard "at the outset". While the court recognized that this notice was "extra the statute and not of controlling force", it nevertheless held that the notice was "appropriate" to the requirements of due

process. This court has held that a notice not provided by statute cannot supply constitutional validity to the statute or service under it. *Wuchter* v. *Pizzutti, supra.* This rule is especially applicable where, as here, the statute specifically prescribes the form of notice which is to be given. Under such circumstances nothing is effective or appropriate under due process except that which the statute provides and that which the employer is entitled to anticipate. It cannot be said that estoppel has destroyed the fundamental right of the employer to a hearing where the estoppel is predicated upon a form used by the Commission outside the scope of the statute. This court will not presume acquiescence in the loss of fundamental rights. *Ohio Bell Teleph. Co.* v. *Public Utilities Com., supra.*

24. The dissenting opinion in the Supreme Court of New Jersey points out that in the early months of the operation under the statute, the Commission sent to employers a notice that a decision had been made. This procedure was thereafter abandoned by the Commission without any indication to the employer that he would no longer receive a comparable form giving notice of the decision in the statutory manner, or that notice of the decision would be dispensed with altogether. Similar misleading circumstances recently led this court to point out that a party must be properly informed before his choice of courses can be said to be intelligent and thus binding upon him. *Moser* v. *United States, supra.*

25. The Supreme Court of New Jersey held that the hearing before the referee in 1943 was an "adequate hearing in the administrative tribunal". This was not the statutory hearing to be held for each benefit claim. It was at this time that there was offered into evidence in the proceedings before the referee as an exhibit by the Commission a series of booklets containing information compiled by the Com-

mission for the purpose of the hearing. These booklets disclosed for the first time the various benefit payments which had been made by the Commission to the former employees of the plaintiff. The Supreme Court holds that the introduction of this document into evidence constituted notice to the appellant in 1943 of the payments of benefits years earlier and further, that the delay in the notice "merely delayed the time for appeal". The court expresses the view in a footnote to its opinion, that the decision of the deputy is not "final" until notification is given. This statement of the court ignores the statutory provision also quoted in the same footnote to the effect that the finality of the decision and the payments of benefits are concurrent events. The statute provides that when the notification is mailed, the decision "shall be final and benefits shall be paid or denied in accordance therewith". All of the benefits involved in this case were paid between 1939 and 1942, long before the hearings were held before the referee and long before the exhibit was introduced into evidence containing the data relating to the payments of benefits.

26. After its extended discussion on the constitutional questions raised and its decision that due process under the United States Constitution was satisfied by the statute and the Commission's action, the Supreme Court said that:

> "Laches and the doctrine of estoppel serve to bar the relief sought."

In its short statement on this point the court indicated that the estoppel existed in the failure of the appellant to make known to the Commission grounds of disqualification in response to the notice of the filing of the claim. This conduct is said by the court to have led the Commission to the belief that there were no grounds of disqualification and, therefore, to make payment of benefits. The Court con-

cluded that the statutory duty of the deputy to inquire into and find the facts was thus cancelled.

27. This attempt by the court to strengthen its opinion on constitutional issues by the inclusion of a non-Federal ground is unsubstantial and illusory. It cannot independently or adequately support that judgment. The appellant by presenting the substantial Federal questions already outlined may, therefore, invoke the jurisdiction of this court. *Lawrence* v. *State Tax Commission, supra; Abie State Bank* v. *Bryan, supra; Ancient Egyptian Arabic Order N. M. S.* v. *Michaux, supra; Ward* v. *Love County, supra.*

28. As is pointed out in the dissenting opinion, the record shows that when it received notice of the filing of the claim for benefits, the appellant knew of no disqualifying cause. Thus, even under the Commission's own procedure, the appellant had no reason to respond to the Commission's notice. But even if the appellant had advised the Commission that, to its knowledge, no reason existed to disqualify the claimant from benefits, the deputy would not have been justified in making the payments and charging the employer's account. Under the statute the validity of the claim for benefits did not depend upon the employer's knowledge of disqualifying causes. The employee was required to establish his eligibility and the deputy was required to investigate and find the facts. The failure of the claimant to satisfy any condition of eligibility or qualification necessitated a decision that his claim was invalid. Many of these conditions were ascertainable only by an examination of the facts by the deputy, in any event the employer could not be expected to know the circumstances which arose after the separation from employment or circumstances having no relation to the employment itself. This is pointed out in the dissenting opinion where it was contended by the minority justices that the construction of

the statute made by the majority imposed upon the employer the burden of doing that which the statute directed to be done by the Commission. The statements in the majority opinion that the appellant conceded that "all such benefit payments were valid" and that "it is undenied that the claimants had a lawful right to the benefits allowed" are completely unsupported by the record. This is shown in the dissenting opinion which said:

> "* * * That the employer had no adverse information to communicate did not signify that there were no disentitling facts or that the employer was not interested in being notified of the decision. I find no concession by the employer that the benefits in question were valid and properly allowed; the concession was that the employer's record did not disclose invalidation."

The very claim of the appellant that the statute was unconstitutional if construed by the court to deny the appellant notice of the decision of the deputy was made because the appellant never had an opportunity to be heard in a proceeding where the claimant for benefits was rquired to sustain the burden of establishing the validity of his claim. Statements of estoppel and laches which are thus predicated by the court upon the failure of the appellant to assume a burden imposed by statute upon the Commission are artificial and unsubstantial, and inadequate to support the judgment of the court.

It is respectfully submitted that there is basis upon which the Supreme Court of the United States has jurisdiction to review the judgment of the Supreme Court of New Jersey in this cause.

SAMUEL KAUFMAN,
Attorney for Appellant.

APPENDIX "A"

SUPREME COURT OF NEW JERSEY

No. A-86, September Term, 1950

Horsmann Dolls, Inc., *Plaintiff-Respondent,*

v.

Unemployment Compensation Commission of New Jersey, *Defendant-Appellant*

Argued February 12, 1951; Reargued April 30 and May 7, 1951; Decided June 25, 1951

On Appeal From the Appellate Division of the Superior Court, Whose Opinion Is Reported in 9 N. J. Super. 101

Messrs. Herman D. Ringle and Morris M. Schnitzer argued the cause for appellant, Messrs. Theodore D. Parson, Attorney General, and Joseph A. Murphy, Assistant Deputy General, on the brief. Mr. Charles A. Malloy, Attorney.

Mr. Samuel Kaufman argued the cause for respondent. Messrs. Sanford Freedman and John M. Kaufman on the brief. Mr. Alexander Budson and Messrs. Bilder, Bilder & Kaufman, Attorneys.

Messrs. Bernard M. Shanley and Harold M. Fisher, for New Jersey State Chamber of Commerce, Messrs. William J. Egan and Thomas L. Parsonnet, for New Jersey Federation of Labor, and Mr. William H. Osborne, Jr., for Crucible Steel Company of America, by leave of court, submitted briefs as *amici curiae.*

The opinion of the court was delivered by

Heher, *J.:*

The subject of controversy here is the validity of the contribution rate assigned to the plaintiff employer for the year 1942 under R. S. 43:21-1, *et sec.*

The employers' rate of contribution to the fund created by this statute for the alleviation of economic insecurity

due to involuntary unemployment, by the maintenance of purchasing power during periods of unemployment, is based on benefit experience. Benefits paid out of the fund on the subject employer's behalf constitute a basic factor in the computation of the rate. Under subsections 7(c) (3) and (4) of the Act, the employer either retains his basic rate of 2.7% or is assigned a merit rate of 1.8% or 0.9% or a penalty rate of 3.6% depending on his employment experience. The excess of contributions by the employer over benefits paid, related to wages upon which contributions had been made during the experience period, determines the "reserve ratio" by which the merit rate is established Where the employer's contributions for the test period are less than the benefits charged against his account, the rate is 3.6%; where the reserve ratio is less than 7.5%, the rate is 2.7%; where the reserve ratio equals or exceeds 7.5% but is less than 10%, the rate is 1.8%; and where the reserve ratio equals or exceeds 10%, the rate is 0.9%.

The plaintiff employer's contribution rate for the years 1942 and 1943 was fixed by the defendant Commission at 3.6%. This was on the hypothesis that plaintiff's contributions during the experience period totalled $48,929.26, and the benefits paid amounted to $98,203.34. On this basis, the rate was properly fixed at 3.6%. But plaintiff protested that its account had been illegally charged with benefits paid, and petitioned for a hearing and a recomputation. On April 1, 1948, after hearing held, the Commission resolved the issue adversely to plaintiff. The Appellate Division reversed the determination for what was deemed to be failure of notice prescribed by subsection 6(b) of the Act. 9 N. J. Super. 101 (1950). The cause was certified here for appeal on the Commission's application.

The primary issue is whether there was a failure of decision and of notice directed by subsection 6(b) of the Act as it then was (c. 270 of the Session Laws of 1936) which constituted an impairment of plaintiff's substantial rights and compels a disallowance of all benefits paid to plaintiff's former employees in computing the experience or merit rate under the statutory formula, even though it is conceded that all such benefit payments were valid and were made pursu-

ant to the Commission's peremptory duty in the fulfillment of the statutory public relief policy.

This was the procedure followed by the Commission during the period in question: The initial claim for benefits filed with the Commission by the employee detached from service was checked against all pertinent record data and information in the possession of the Commission; and when the examination revealed no ground for disputing the validity of the claim, there was dispatched to the employer Form B-11, entitled "Notice to Employer of Claim for Benefits," advising the employer of the making of the claim for benefits and that the "Wage records on file in this office indicate that said worker is eligible for such benefits," and "if you have any objections to payment of this claim, check the appropriate item in the adjoining column and return original copy within seven days from date" to the Commission at Trenton. The column questions were designed to elicit all possible grounds of ineligibility. And there was endorsed on the back of the notice a printed statement that its purpose was to discover "any facts that might disqualify the claimant or render him ineligible." Such was the unvaried practice in the case of the plaintiff employer. It is admitted that plaintiff received such notices; and there is no contention that any of the benefit payments in question were made without such prior notice. There was no response to any of the notices so given plaintiff, nor did plaintiff return any of the separation notices prescribed by the Commission's regulations, which called for an immediate statement by the employer of grounds for disqualification, related to the separation from employment, for the good and sufficient reason that the claimants were under no disqualification. This was acknowledged by Garnier, plaintiff's comptroller, who was in charge of all notices of claims for benefits and all matters relating to employment experience and the contribution rate chargeable to plaintiff. He testified that he "really paid no attention" to the notices B-11, because plaintiff's was "a seasonal business," the plant was "shut down January, February and March, and sometimes April," and "we had no employment; there was no objection I could make."

The witness acknowledged that he would have known if any of the claimants for benefits during this period was disqualified, and that he was aware at the time that many of the claimants, including his own son, were receiving weekly benefits, indicating that their claims for benefits had been allowed. It was then the Commission's practice to send a notice of the deputy's disposition of the claim for benefits only to employers who had responded to the notice B-11 or had given a separation notice in accordance with the Commission's regulations.

In June, 1942, plaintiff was given notice of its experience rate for the then current year, the rate now in controversy; and this was followed by the petition for a hearing. Shortly thereafter, plaintiff was given a breakdown of the benefit charges for the period in question, identifying its employee-recipients of benefits, and later on, November 1, 1943, plaintiff received a separate statement of each individual benefit claim for that period containing all the elements of an "initial determination" and the benefits paid on each claim. Except for a few isolated duplications corrected by the Commission itself, no proof was submitted or tendered by plaintiff tending to show that any of the claims were invalid and therefore not chargeable to its account. It is undenied that the claimants had a lawful right to the benefits allowed.

The contention is that the "decision" required by subsection 6(b) was not made with respect to the claims for benefits allowed and charged to plaintiff's account, and that plaintiff "was irretrievably prejudiced by the failure of the deputy to promptly notify it of the decision" made. It is said that this section laid upon the deputy the duty of an "initial determination" of "the validity of the claim, the commencement of the benefit period and its duration, and the weekly benefit amount," and that the failure of "timely notice" to the plaintiff employer of a "decision" definitive of these elements constituted a fatal deviation from the statute and a denied of due process of law in violation of the State Constitution and the Fourteenth Amendment to the Federal Constitution. It is argued on the brief that the statute requires that the initial determination be

followed by weekly determinations during the compensation period of the claimant's right to continued benefits and his eligibility for work; and on the oral argument it was vigorously contended that unless the statute be construed to require weekly decisions and notice thereof to the employer, it would constitute in this regard a denial of due process.

As respects the "decision" to which the provision for notice has reference, and the significance of the phrase "other interested party," subsection 6(b) is not free from ambiguity. But we shall resolve the doubt in favor of notice. In this view, the failure of notice to the plaintiff employer of the deputy's initial determination of the detached employee's eligibility for benefits did not result in substantial prejudice to plaintiff which demands that his account for rate purposes be disburdened of the benefits lawfully paid to the detached employee because of seasonal unemployment. The want of notice of the initial determination, however informal the decision, did not serve to deprive plaintiff of such remedy by appeal as the statute gave him, for plaintiff concedes that its failure to respond to the notices B-11 was the entire absence of grounds of disqualification. *Ergo,* there would not have been an appeal if notice of the determination had been given. As we have seen, there is no suggestion that any of the allowances for benefits here involved were unlawfully made, or were excessive in amount, or covered an undue period. There was no loss of a substantial right.

The disburdening of plaintiff's account of benefits thus lawfully paid would work serious detriment to the statutory policy of unemployment insurance without reparatory service to appellant. Administrative failures or deficiencies cannot be made to serve the interests of one whose substantial rights have not been thereby invaded. The statute does not say that, for the purpose of computing the employer's contribution rate, a failure of notice of the initial determination shall, in and of itself, work a disburdenment of the employer's account of the benefits lawfully paid; and the corollary is that the employer cannot invoke

the commission save as may be needed to repair the injury done to him. He may not resort to the default for his unjust enrichment. Here, there was notice to plaintiff of the claims for benefits and a demand that grounds of disqualification be made known. In the cited case of *Bell-Brook Dairies, Inc.* v. *Bryant*, 35 Cal. 404, 218 Pac. (2d) 1 (1950), there was no notice to the employer of the claims for benefits; and it was held that the failure of notice of the making of the claims "deprived plaintiff of the opportunity to defeat the claims by offering the claimants suitable employment," and "an opportunity to prevent the creation of the conditions giving rise to the tax or to show facts which might have established that the claimants were not entitled to benefits." But this is not so here. Plaintiff had notice of the claims, and failed to respond because of no known ground of disqualification.

But plaintiff says that the failure of prompt notice of the benefit allowances deprived it of the opportunity to provide employment and thereby to disqualify the claimants for benefits chargeable to its account, and to protect itself against disqualification arising subsequent to the initial award. The point is without substance. It conclusively appears that, because of the seasonal nature of the business, plaintiff could not provide employment during the benefit period. The layoff was an incident of the annually recurring season of unemployment then characteristic of the trade; and plaintiff well knew that its detached employees, with rare exceptions, would promptly receive benefits for the period prescribed by the law. Such is the purpose of employment security. And the notice of the initial determination would be of no avail in the discovery of after-occurring disqualifications. Recognition of this led to the contention on the oral argument that unless the statute be construed to require weekly determinations and notice to the employer, it would be violative of due process. The statute makes no such requirement; and its failure so to provide does not constitute a denial of the essence of procedural due process. Plaintiff was aware of the continuing benefit payments to its detached employees; and it knew disqualification by the provision of unemployment or

want of attachment to the labor market, or otherwise, would bear upon the merit rate.

Plaintiff had notice of the claims for benefits and an opportunity to be heard at the outset. If this be deemed *extra* the statute, and not of controlling force, it was open to plaintiff to challenge in the administrative tribunal the validity of the charges to its account, not only when it was first apprised of the contribution rate in July, 1942, but later on, in 1943, when the contribution rate was amended and there was a detailed revelation of the charges to its account for benefits paid and the findings made in the individual case. And there was a full judicial review by *certiorari.*

Employment security is a branch of social insurance designed to serve the general welfare. Unemployment insurance makes provision against the loss of income incident to involuntary unemployment. A special fund established for the achievement of this objective is raised and maintained by an excise in the form of payroll and wage taxes. The purpose is to relieve the public generally of the economic burden of unemployment and place it on industry. *55 Yale Law Journal, 1.* The specific aim of the provisions of the New Jersey Act for experience or merit rating is to encourage stable employment and to make a fair and equitable apportionment of the burden of the payroll excise. The whole is to promote the essential public interest rather than the particular interest of the employers. If the outstanding policy of the statute is to be served, compensation must be rendered promptly to workers whose income has ceased by reason of involuntary unemployment. The right to these benefit payments is not conditioned upon notice to the individual employer. The special interest of the employer is the measurement of the payroll excise by the benefits paid; and he cannot complain of the want of due process if he is afforded a full hearing at some stage of the proceedings on the question of the validity of the charges to his account for benefits paid. The requirements of due process are satisfied if, after appropriate notice, the person charged with the excise be given an opportunity to be heard as to the validity and the amount of the levy at some point in the proceedings before the excise becomes

irrevocably fixed. *Nickey* v. *Mississippi,* 292 U. S. 393, 54 S. Ct. 743, 78 L. Ed. 1323 (1934); *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276, 45 S. Ct. 491, 69 L. Ed. 953 (1924); *McGregor* v. *Hogan,* 263 U. S. 234, 44 S. Ct. 50, 68 L. Ed. 282 (1923); *Turner* v. *Wade,* 254 U. S. 54, 41 S. Ct. 27, 65 L. Ed. 134 (1920); *Security Trust & Safety Vault Co.* v. *Lexington,* 203 U. S. 323, 27 S. Ct. 87, 51 L. Ed. 204 (1906); *Galluo* v. *Schmidt,* 183 U. S. 300, 22 S. Ct. 162, 46 L. Ed. 207 (1902); *Pittsburgh C. C. & St. L. R. Co.* v. *Board of Public Works,* 172 U. S. 32, 19 S. Ct. 90, 43 L. Ed. 354 (1898); *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U. S. 526, 16 S. Ct. 83, 40 L. Ed. 247 (1895). Notice and hearing are requisite where the determination of the amount of the levy involves the exercise of *quasi*-judicial power. *Turner* v. *Wade, supra; Hodge* v. *Muscatine County,* 196 U. S. 276, 25 S. Ct. 237, 49 L. Ed. 477 (1905). Due process of law is denied only where the proceeding is arbitrary, oppressive or unjust. *Glidden* v. *Harrington,* 189 U. S. 255, 23 S. Ct. 574, 47 L. Ed. 798 (1903).

Here, plaintiff was afforded an adequate hearing in the administrative tribunal, and there was available a full appellate review both on the law and the facts. *Rules 1:20-20, 3:81-9.* The delay in the notice merely delayed the time for appeal. The definitive inquiry is whether plaintiff suffered prejudice by the failure of prompt notice of the allowance of the claims for benefits. Plaintiff's argument concedes as much. A finding of prejudice would be arbitrary. The claim of injury is theoretical and fanciful, utterly without foundation in fact. In the circumstances, disburdening plaintiff's account of these benefit payments would not be in accord with equity and right conscience. Due process is a principle of natural justice secured by Magna Charta and the successive constitutions of Nation and State; the substance of procedural due process is reasonable notice and opportunity to be heard, and the principle is not to be pressed beyond its essential quality. In the case made here, the "bare possibility" of injury is not enough; there must be a showing of the likelihood of harm. *Gange Lumber Co.* v. *Rowley,* 326 U. S. 295, 66 S. Ct. 125, 90 L. Ed. 85 (1945); *Stockholders of the Peoples Bank-*

ing Company of Smithsburg v. *Sterling*, 300 U. S. 175, 57 S. Ct. 386, 81 L. Ed. 586 (1937). Unless approximately one-half of all the unemployment compensation benefits paid to plaintiff's detached employees during the years 1939, 1940 and 1941 were in violation of the Act, as utterly devoid of merit, plaintiff would still be liable to the penalty rate of 3.6%.

It follows that if plaintiff's account be disburdened of the base-year charges of $3,112.61, and the unallocable items amounting to $1,750.76, the penalty rate of 3.6% stands unaltered and so there is no occasion to consider the question of the validity of those charges.

Laches and the principle of estoppel in *pais* serve to bar the relief sought. Plaintiff knew that benefits were being paid to the separated employees, and it was well aware that, in making these payments, the Commission relied upon its failure to make known grounds of disqualification in response to the notices B-11. By plaintiff's conduct, the Commission was led to believe that the claimants were under no disqualification, and acted accordingly. Plaintiff intended that its inaction be so interpreted, for that was the fact. Plaintiff cannot now in equity and good conscience demand that, for want of the notice of the initial determination, it be disburdened of the benefits so paid. Compare *McSwooney* v. *Equitable Trust Co.*, 127 N. J. L. 299 (E. & A. 1941); Appeal dismissed, 315 U. S. 785, 62 S. Ct. 805, 86 L. Ed. 1191 (1942); *Sun Dredging, &c., Company* v. *Ottens*, 85 N. J. L. 740 (E. & A. 1913). One may not be permitted to found a claim upon his own inequity. *R. H. Stearns Co.* v. *United States*, 291 U. S. 54, 54 S. Ct. 325, 79 L. Ed. 647 (1934). There was acquiescence by conduct in the administrative procedure which precludes its repudiation to serve plaintiff's present interest in a discriminatory contribution rate. The cancellation of these charges to plaintiff's account "would not be responsive to the demands of justice and good conscience." *New Jersey Suburban Water Co.* v. *Harrison*, 122 N. J. L. 189 (E. & A. 1939).

The judgment of the Appellate Division is reversed and the determination of appellant's contribution rate by the Unemployment Compensation Commission is affirmed.

APPENDIX "B"

SUPREME COURT OF NEW JERSEY

SEPTEMBER TERM, 1950

No. A-86

HORSMAN DOLLS, INC., a Corporation of New Jersey, *Plaintiff-Respondent,*

vs.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY, *Defendant-Appellant*

CASE, J. (Dissenting):

The judgment of the Appellate Division should, I believe, be affirmed throughout.

Benefits were charged to respondent's account by the Unemployment Compensation Commission for the years 1939 to 1941 inclusive in the amount of $93,000 where respondent was the last employer and of $3800 where respondent was the employer in the base year. Those figures do not represent the judgment; they are simply important factors in determining the plaintiff's rate of contribution to the general fund. It was conceded before the Appellate Division and is conceded before us that the item of $3800 was improperly included. For accuracy in the record and for a precise disposition of the issues there should, therefore, be no disturbance of the striking of that item by the Appellate Division.

My vote to affirm the judgment in the Appellate Division in setting aside the remainder of the decision by the Commission is substantially upon the grounds stated in the opinion written by Judge Colie for the Appellate Division and reported in 9 N. J. Supra, 101.

The statute as it then was (R.S. 43:21-6(b)) required that the executive director, by his designee, should determine whether a claim for benefits was valid, and, if valid, when the payments should begin, the weekly amount payable

and the maximum duration thereof, and should promptly notify the claimant and *any other interested party* of the decision and the reasons therefor. The Commission was not authorized to pay benefits until such notice had been given and the designated period for appeal had elapsed. The last employer was, of course, an interested party; none more so, because the charge would be made against his account. The deputy originally recognized that obligation and maintained the practice of sending to the employer a notice on Form B-11 that the worker had made claim for benefits, that the records of the Commission indicated that the claimant was eligible for benefits in a named amount and that if the employer had any objections to payment of the claim he should check appropriate items in the form and return, and along with that notice, and in effect as a part thereof, the deputy sent a letter stating, *inter alia,* that "the purpose of the notice is to inform you that the Commission has declared the claimant to be eligible for benefits in the amount as indicated, and to allow you to present to the Commission any information in your possession which would make the claimant ineligible for benefits." The information thus given measurably complied with the statute; it notified the employer that the Commission had considered and granted the claim in the amount stated on Form B-11. The importance of that information lay in the fact that the claim could have been invalidated by incidents which occurred after the worker had left the employer, about which the employer would have no information but upon which it was the deputy's duty to find the facts and so determine the validity of the claim. Such incidents, for instance, could be the claimant's availability for work, pregnancy if a woman, the claimant's removal from the labor market, refusal to take a comparable job, receipt of old age pension, conditions which could depend upon facts wholly foreign to, or subsequent to, the employer's record. That the employer had no adverse information to communicate did not signify that there were no disentitling facts or that the employer was not interested in being notified of the decision. I find no concession by the employer that the benefits in question were valid and

properly allowed; the concession was that the employer's record did not disclose invalidation. The Commission could not either by rule or regulation, or by a procedure adopted by its officers and employees, nullify a statutory requirement; it could not place upon an employer the burden of doing that which the statute imposed upon the Commission. And it is not for us to hold that the employer was obliged, before receiving notice of the decision, to make such inquiry into facts outside his knowledge as would enable him to determine, in advance, what his course would be with respect to an appeal.

For some reason the office changed Form B-11 so that it no longer contained the amount of benefits for which the worker was eligible and discontinued sending the letter or any substitute form of notification that the claim had been allowed. Indeed there is no satisfying proof that the office followed the practice of making a determinaiton of validity unless the issue of a compensation check is, *ipso facto,* to be accepted as such; and even notice of the payment of the check was not given the employer. All, then, that the employer knew was that a claim had been presented; it was left in complete ignorance of the finding thereon. I do not consider notice of successive weekly payments so important as an initial notice that the claim was determined to be valid. The omission was clearly in violation of the statute, and that which was omitted was, in my opinion, a necessary preliminary to a charge against the employer's account for the purpose of fixing the employer's rate of contribution to the fund. The workers to whom unemployment benefits were paid are not concerned with this proceeding.

That the requirement is considered vital by the legislature is apparent from the continued direction in even more positive terms, as by ch. 308, P. L. 1945, in amending the paragraph designated above, "The deputy shall promptly notify the claimant, the most recent employing unit and all employers in the base year of the decision and the reasons therefor", and by ch. 167, P. L. 1950 (R. S. 43:21-6 (b) (2)), "Whenever a determination of eligibility shall be made with respect to the first week of the benefit year for which benefits are claimed, the claimant, the last employing unit

and all employers in the base year shall be promptly notified of such determination". Provisions enacted subsequent to the period in question do not, of course, vary the obligation of the Commission or of its officers, but the statutory citations indicate the importance which the legislature attributes to the making of a determination and the giving of immediate notice thereof to the employer.

Inasmuch as nothing answering to a judicial or quasi-judicial determination was made, and no notice of validity or allowance was given, I can see nothing else than that the plaintiff was deprived of its right of appeal made, by the statute, to depend upon the making of the decision and the giving of notice thereof.

Justice Acherson concurs herein.

APPENDIX "C"

HORSMAN DOLLS, INC., A CORPORATION OF NEW JERSEY, PLAINTIFF-APPELLANT, V. UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY, DEFENDANT-RESPONDENT.

Superior Court of New Jersey, Appellate Division

Argued July 10, 1950—Decided August 15, 1950

On appeal from decisions of Unemployment Compensation Commission.

Before Judges McGeehan, Colie and Eastwood

Mr. Samuel Kaufman argued the cause for appellant (Messrs. Bilder, Bilder & Kaufman, attorneys).

Mr. Herman D. Ringle argued the cause for respondent (Mr. Charles A. Malloy, attorney).

The opinion of the court was delivered by

COLIE, *J. A. D.:*

This matter is before the court as an appeal under Rule 3:81-8 from final decisions of the Unemployment Compensa-

tion Commission rendered April 1, 1948. *Certiorari* was allowed by a justice of the former Supreme Court prior to September 15, 1948.

Horsman Dolls, Inc., is a subject employer under the Unemployment Compensation Act. The act as originally passed provided for contributions from subject employers at a uniform rate. Thereafter and at the times with which this litigation is concerned, the system of "experience or merit rates" was effective. The rate for a given employer was fixed by the Commission as follows: The employer contributions were totaled and the total benefits paid to employees deducted therefrom, the balance was the "reserve fund" credited to the employer's account. The total contributions made for the past three and five years were computed. These totals were divided by three and five respectively to get the average yearly contribution. The higher of the average yearly contribution was taken as the basis of determining the percentage that the "reserve fund" bore to it. That percentage was called the "reserve ratio" and dependent upon it, future contribution rate was fixed by the Commission. The rate varied from a high of 3.6% where employer contributions were less than the benefits charged to it, to a low of .9% where the reserve ratio equaled or exceeded 10%.

The decision under review fixed the contribution rate for the company at 3.6% for the years 1942 and 1943 and therefore the amount of benefits paid is important since that amount is a factor in determining "reserve ratio" and dependent upon that, the contribution rate.

Horsman Dolls, Inc., is the successor of Regal Doll Co. The change in name took place in 1939. The 1942 rate for Horsman Dolls was fixed at 2.7%. Thereafter the Commission recomputed the Horsman Dolls rate at 3.6%. The increased rate came about as a result of combining the Regal account for the period January 1, 1936-December 31, 1939, and the Horsman account for the period January 1, 1940-December 31, 1941. When Horsman Dolls was notified of the 3.6% contribution rate it filed a petition for hearing and as a result of information obtained at the hearing and in a memorandum of the Commission dated October 27, 1943,

learned that the charges against its account, as most recent employer, were $93,266.16 of which $91,094.77 arose from benefits charged against Regal.

(1) R. S. 43:21-6 (b), at the time with which we are dealing, provided that a deputy should examine a claim filed for benefits, find the facts, determine the validity of the claim and, if valid, the week when payments commence, the amount payable and the duration of the payments, and then provided that "The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor." The Commission, presumably acting in conformity to the above provision, originally set to the most recent employer a form B-11 entitled "Notice to Employer of Benefit Allowance," and an informational letter. The form advised the most recent employer of the claim, that the records indicated the claimant to be eligible for benefits in an amount specified in the form and that the addressee was the most recent employer. The letter advised the purpose of the form and the mathematical formula used to determine the charge against the employer. In May, 1939, a new B-11 was prepared, designated "Notice to Employer of Claim for Benefits." The use of the informational letter was discontinued in May, 1939. The revised form B-11 set forth that the worker stated his last employment to be with the addressee and that he had filed a claim and that the wage records in the office of the Commission indicated him to be eligible. The revised B-11 did not advise the employer that an allowance had been made or the amount of such allowance, and was sent only to the most recent employer and not to the employer or employers in the base or prior year. The revised B-11 did not constitute notice of the decision of the deputy and plainly does not comply with the statutory requirement.

(2) When the Commission in May, 1939, ceased sending the informational letter and the original B-11 which gave notice of the allowance of the benefit, the employer no longer received the notice required by the statute. The revised B-11, in the absence of an explanatory letter, gave the employer notice only that a claim had been made. The em-

ployer is never affected by the mere making of a claim. The statute requires notice to the employer that an allowance had been made. It is the making of an allowance, not the filing of a claim that affects the employer's rate.

(3) In its brief the Commission argues that Horsman Dolls cannot challenge the procedure followed by the deputy because of its failure to comply with Regulation 20.02 which we quote below:

"20.02. Separation Notices Required Under Conditions Which May Disqualify:

"(a) Whenever a worker is separated from his employment (permanently or for an indefinite period or for an expected duration of seven or more days) under conditions which may disqualify such worker from benefits pursuant to the provisions of Section 5 of the Law, his employer shall within twenty-four hours after such separation deliver to such worker or mail to his last known address, if delivery is impossible or impracticable, a separation notice on such form as may be prescribed by the Commission. Such notice shall set forth: (1) the worker's full name; (2) his social security account number; (3) the last day on which he was employed; (4) a brief statement of the reason for the separation; (5) such other information as is required by such form. The employer shall immediately send a copy of such separation notice to the office of the Commission at Trenton.

"(b) Upon request by the Commission for any information with respect to the separation of any worker separated from his service for an employer or employing unit, such employer or employing unit shall, within forty-eight hours following the receipt of such request, furnish the Commission with the information requested. Any employer who fails either to furnish the separation notice referred to in Regulation 20.02 (a) to a worker separated from his employment and to the office of the Commission at Trenton, or to indicate thereon that such worker may be disqualified for benefits under any provision of Section 5 of the Law, or to

furnish any other information requested by this Commission, shall be presumed to have admitted that such worker is not disqualified under any of the provisions of Section 5 of the Law."

The statute requires the deputy promptly to notify an interested party of the decision and we hold that the failure of Horsman Dolls, Inc., to give the notice of separation called for by the regulation does not excuse the failure of the Commission to perform its statutory duty. The Commission argues that the "decision" required by the statute was made when the first check in payment of benefits was sent to the employee, i.e., that the check was "tantamount to a decision." Even accepting this argument, which we do not do, it still would not be notice to the employer because the employer never received notice that the check had gone out. The effect of the regulation is to put the burden of proof on the employer when the employer questions a decision or allowance, that is to say, it creates a presumption which the employer is called upon to rebut if he can. If the original B-11 and the informational letter had gone out or if the statute had been complied with, then the employer, if he wished to dispute the amount of the award, would be faced with the burden of proving the facts upon which he would depend to attack the amount or the granting of the award. That is the extent of the effectiveness of the regulation and it cannot be tortured into doing away with the statutory requirement of the notice of allowance.

The decisions under appeal are reversed.

APPENDIX "D"

Decision of the Unemployment Compensation Commission

The Unemployment Compensation Commission of New Jersey met in formal session on the 9th and 27th of January, 1948, and having reviewed and considered the record of the proceedings compiled at formal hearings held on May 14,

May 17, July 28, September 28 and November 1, 1943, determined as follows:

FINDINGS OF FACT:

On January 8, 1943, Horsman Dolls, Inc. (successor to Regal Doll Co.) was notified by the Commission that its contribution rate for the year 1942 was 3.6 per cent. A formal petition for hearing was filed by the Petitioner with the Commission on March 9, 1943, wherein it alleged "Petitioner contends that improper charges have been made against his account adversely affecting his rate."

The Petitioner at the formal hearings contended that it had during the years 1939 to 1941, inclusive, received no notices which conformed to the requirements of subsection 6(b) of the Unemployment Compensation Law (R. S. 43:21-6(b)) with exception of the notices received prior to the months of June or July, 1939; that the failure on the part of the Commission to forward proper notices to it precluded the Commission from charging the benefits paid to its former employees to its account, and that such charges could not be considered by the Commission in determining its contribution rate for the year 1942 under the contribution rate formula based on benefit experience prescribed in subsection (7) (c) of the Unemployment Compensation Law (R. S. 43:21-7(c)); that it should be assigned the lowest contribution rate of .9 per cent.; and that the Commission's action in charging the benefits paid to its former employees to its account violated its constitutional rights under the Fourteenth Amendment to the United States Constitution because such charges were considered in determining its contribution rate for the year 1942.

By stipulation it was agreed that the action taken by the Commission with respect to the 1942 contribution rate, after a consideration of the record of the proceedings in this case, would apply to the rates assigned to the Petitioner for the years 1943, 1944 and 1945.

The testimony shows that during the years 1939 to 1941, inclusive, claims for benefits were filed with the Commission by individuals who had formerly been in the employ of the Petitioner, and that when each claim was filed with the Commission, the Commission mailed to the Petitioner a

notice thereof; the notices are represented by Exhibits P-4, P-10 and P-11 of the record.

The Petitioner did not forward to the Commission any Separation Notices as required by the Commission's regulations, and when it received notices that benefit claims had been filed by its former employees, it did not give the Commission any notice or information that the individuals involved were not entitled to receive benefits or were disqualified from receiving benefits, nor did it make any objection to the payment of benefits.

The Petitioner's business was seasonal and benefit claims were filed by the Petitioner's employees at the time of seasonal lay-offs.

In many instances, appeals from the action of the Commission's deputy denying benefits were taken by claimants to the Appeal Tribunal, and although the Petitioner received full notice of such appeals and the hearings scheduled before the Appeal Tribunal, it did not appear at any hearing nor express any interest in the proceedings.

Benefits were charged to the Petitioner's account for the years 1939 to 1941, inclusive, as follows: $93,000 where it was the last employer in the base year, $3,800 where it was not the last employer in the base year, and $700 unallocated, making a total of $97,500. The Petitioner's contribution rate would still be 3.6 per cent for the year 1942 even if the unallocated items and the charges made to the Petitioner's account, where it had not been the last employer, were excluded.

During the proceedings, notices designated Forms B-110, showing the amount of benefits paid to each claimant and the period charged with such payments, were presented to the Petitioner and are marked in the record as Exhibit P-15. On November 1, 1943, the Petitioner was presented with notices showing in detail the action taken by the deputy with respect to each benefit claim; particularly, the amount of benefits payable, the amount of benefits paid, the period covered with respect to which benefits were paid, etc.

No proof was offered by the Petitioner to show that its former employees, during the period involved, were not entitled to receive the benefits which were paid to them.

OPINION AND DECISION:

The Commission is put in this position: It is asked by the Petitioner to erase from its account charges that have been made by reason of the payment of benefits to its former employees. There is no proof whatsoever before the Commission that any of these charges were improperly made or that any of the employees were not entitled to those benefits; Petitioner has had ample opportunity on several occasions to take timely objection to these payments and to test their legality before the benefit tribunals erected under the Unemployment Compensation Law; Petitioner has persistently and stubbornly refused to so test the validity of these payments before the benefit tribunals, insisting that it has been under no obligation to do so and that this Commission, nevertheless and notwithstanding, must disburden its account of the chargebacks so made. This Commission conceives that it is without legal authority to do this and it is unable to relieve the account of any employer of charges for benefits paid unless there is a demonstration in the proper tribunals that the individuals to whom such payments were made were not entitled thereto.

ERNEST EGER,
Chairman of the Commission.

Commissioners concurring:
MARY G. ROEBLING,
A. CREW SCHIELKE,
NORMAN F. WISS.

Attest:

DEAN H. ASHTON,
Hearing Clerk.

Dated: April 1, 1948.